

Allison H. Goddard (211098)
ali@pattersonlawgroup.com
PATTERSON LAW GROUP
402 West Broadway, 29th Floor
San Diego, CA 92101
(619) 398-4760
(619) 756-6991 (facsimile)

*Attorneys for Plaintiff,
Wi-LAN Inc.*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO

WI-LAN INC.,

Plaintiff,

vs.

APPLE INC.,

Defendant.

REDACTED FOR PUBLIC FILING

1 In order to avoid disrupting the presentation of evidence at trial with multiple
2 preservation objections, Wi-LAN Inc. (“Wi-LAN”) respectfully submits for the record
3 the following written objections to the expected testimony of the expert opinions of
4 Lance Gunderson. Mr. Gunderson is expected to proffer unscientific, unsupported
5 and/or irrelevant expert testimony on: (A) Economics and Surveys, despite lacking
6 relevant expert qualifications; (B) Royalty Stacking, despite basing his opinion on zero
7 competent evidence of royalty stacking in this case; (C) Patent Counting, performing
8 arbitrary arithmetic using Apple’s approach to licensing standard essential patents
9 (SEPs); (D) Unhelpful Licenses, despite failing to account for technological and
10 economic differences between them and the September 2014 hypothetical negotiation;
11 (E) Irrelevant Events, solely meant to inject irrelevant, confusing, and distracting
12 issues that have no relevance to the determination of damages; and (F) Non-Infringing
13 Alternatives (“NIAs”) analysis, based on speculative lay opinions. Therefore, Mr.
14 Gunderson’s testimony should not be admitted for the reasons stated in Wi-LAN’s
15 *Daubert* and motion *in limine* briefing under Federal Rules of Evidence 401, 402, 403,
16 701 and 702 (ECF No. 328 at 13-23, 23-35; ECF No. 384 at 5-10, 10-15; ECF No. 415
17 at 8-12; ECF No. 422 at 1-7).

18 First, even though Mr. Gunderson readily admits that he is not a survey expert,
19 and demonstrably lacks qualifications on economics and survey analysis based on his
20 inability to answer basic questions about market analysis, Mr. Gunderson criticizes the
21 opinions of Wi-LAN experts David Kennedy and Prof. Jeffrey Prince, regarding the
22 amount of profit from the accused devices that Apple would lose were it not to use the
23 technologies taught by the patents-in-suit. (ECF No. 328 at 23-25.) Indeed, with
24 respect to Prof. Prince’s expert report, analyzing the results of the choice-based
25 conjoint (CBC) study measuring the value of the technologies taught by the patents-in-
26 suit to smartphone owners, Mr. Gunderson [REDACTED]
27 [REDACTED]
28

1 Second, Mr. Gunderson is expected to testify about “royalty stacking” concerns
 2 about a putative LTE royalty stack, despite the lack of competent evidence of royalty
 3 stacking in this case. *See Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1234 (Fed.
 4 Cir. 2014). Mr. Gunderson’s anticipated testimony on the putative LTE stack is that [REDACTED]

5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED] However, Mr. Gunderson admits [REDACTED]
 9 [REDACTED]
 10 [REDACTED] See

11 *CSIRO v. Cisco Sys., Inc.*, 809 F.3d 1295, 1302 (Fed. Cir. 2015) (“[A]bstract
 12 recitations of royalty stacking theory, and qualitative testimony that an invention is
 13 valuable—without being anchored to a quantitative market valuation—are
 14 insufficiently reliable.”); *see generally Dep’t of Toxic Substances Control v.
 15 Technichem, Inc.*, No. 12-CV-05845-VC, 2016 WL 1029463, at *1 (N.D. Cal. Mar. 15,
 16 2016) (“When he is not simply speculating, [defendants’ expert] often does no more
 17 than regurgitate information given to him by other sources (including self-serving
 18 assertions by the defendants.”).

19 Third, using Apple’s professed SEP licensing framework without any analysis as
 20 to its applicability to the patents-in-suit, Mr. Gunderson divides the margin [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED] See, e.g., *Golden*

24 *Bridge Tech. v. Apple Inc.*, No. 5:12-cv-04882-PSG, 2014 WL 2194501, at *6 (N.D.
 25 Cal. May 18, 2014); *In re Innovatio IP Ventures, LLC Patent Litig.*, No. 11 C 9308,
 26 2013 WL 5593609, at *10 (N.D. Ill. Oct. 3, 2013) (“the court notes that it is not
 27 appropriate to determine the value of the non-asserted standard-essential patents based
 28 merely on numbers. If a patent holder owns ten out of a hundred patents essential to a

1 given standard, it does not automatically mean that it contributes 10% of the value of
 2 the standard.”). Mr. Gunderson’s recitation of these figures—████████████████
 3 —is supported *only* by one Apple employee’s “say-so,” which
 4 fails to satisfy the level of rigor required by Rule 702(b). (ECF No. 328 at 27-29.)
 5 Further, Mr. Gunderson likely will apply this arbitrary patent counting exercise to a
 6 number of Apple and Wi-LAN lump sum licenses, which is unsupportable for
 7 calculating royalty because it ignores the fact that different patents have different
 8 values. *ResQNet.com, Inc. v. Lansa, Inc.*, 828 F. Supp. 2d 688, 694-95 (S.D.N.Y.
 9 2011); *Avago Techs. General IP (Singapore) Pte. Ltd. v. AsusTek Computer Inc.*, No.
 10 3:15-CV-04525-EMC, ECF 367, at 45 (N.D. Cal. Nov. 9, 2016); *Limelight Nets., Inc.*
 11 *v. XO Commc’ns, LLC*, NO. 3:15-CV-720-JAG, 2018 WL 678245, at *8 (E.D. Va.
 12 Feb. 2, 2018).

13 *Fourth*, Mr. Gunderson fails to meet the stringent requirements set forth by the
 14 Federal Circuit in his license comparability analysis of both Wi-LAN licenses under
 15 *Georgia-Pacific* (GP) factor 1 and Apple licenses under GP factor 2. (ECF No. 328 at
 16 30-33; ECF No. 384 at 14-15.) *See ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860,
 17 869 (Fed. Cir. 2010) (“This court has long required district courts performing
 18 reasonable royalty calculations to exercise vigilance when considering past licenses to
 19 technologies other than the patent in suit [for GP 1.”); *Lucent Techs., Inc. v. Gateway,*
 20 *Inc.*, 580 F.3d 1301, 1328 (Fed. Cir. 2009) (explaining that for GP 2 exclusion of a
 21 license agreement is warranted where patented technology lacks relationship to
 22 licensed technology). Apple does not disagree with the principles set forth in *Lucent*,
 23 580 F.3d at 1328, and *ResQNet*, 594 F.3d at 870, that experts must explain in detail any
 24 comparability analysis for licenses to patents other than the Patents-in-Suit. *See M2M*
 25 *Sols. LLC v. Enfora, Inc.*, 167 F. Supp. 3d 665, 677-79 (D. Del. 2016) (excluding
 26 experts’ “*ipse dixit*” where they made “loose, vague allegations of technological
 27 comparability, without any explanation . . . and do not even provide a basis to
 28 meaningfully assess technological comparability”). The Federal Circuit has repeatedly

1 warned that licenses do not help a jury if they offer “little more than a recitation of
2 royalty numbers.” *Apple, Inc. v. Samsung Elecs. Co.*, 2013 U.S. Dist. LEXIS 160337,
3 *47 (N.D. Cal. Nov. 7, 2013) (citing *Wordtech Sys., Inc. v. Integrated Networks*
4 *Solutions, Inc.*, 609 F.3d 1308, 1320 (Fed. Cir. 2010); *Lucent Techs., Inc. v. Gateway,*
5 *Inc.*, 580 F.3d 1301, 1329 (Fed. Cir. 2009)).

6 [REDACTED]
7 [REDACTED]
8 [REDACTED] Additionally, any probative value of
9 this settlement agreement pre-dating the hypothetical negotiation by over three years is
10 greatly outweighed by the risk of unfair prejudice, confusion of the issues, and
11 misleading the jury, Fed. R. Evid. 403, particularly given the “changing technological
12 and financial landscape in the market” for smartphones. *Apple*, 2013 U.S. Dist. LEXIS
13 160337, at *48-49 (quoting *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d
14 51, 78 (Fed. Cir. 2012)).

15 Apple disclosed the following slide, which demonstrates Apple’s intent to use
16 [REDACTED]
17 [REDACTED] [REDACTED]
18 [REDACTED]
19
20
21
22
23
24
25
26
27
28

1 [REDACTED]
2 [REDACTED] Apple further represented that [REDACTED]
3 [REDACTED]
4 [REDACTED] Those representations were made *after* the Court
5 issued its tentative ruling to deny Apple's motion *in limine* seeking to exclude
6 reference to [REDACTED]
7 [REDACTED] As this Court explained, allegations that [REDACTED]
8 [REDACTED]
9 [REDACTED] [REDACTED]
10 [REDACTED]
11 If Apple were now permitted to introduce [REDACTED]
12 [REDACTED]
13 [REDACTED] the FRE 403 balance would
14 then unfairly tipped in Apple's favor.

15 *Fifth*, Wi-LAN objects as irrelevant, unfairly prejudicial, and distracting from
16 the issues in this case any gratuitous expert testimony on Wi-LAN CEO James
17 Skippen's statements regarding the legal environment or challenges being faced by
18 patent holders in enforcing their patents because this would threaten to drag a host of
19 irrelevant, confusing and distracting issues concerning regulatory and judicial
20 developments into this case—*Georgia-Pacific* does not instruct to value patents
21 depending on how difficult it is to prosecute infringers. Rather, the focus of damages
22 should be on valuing the specific infringement of the Patents-in-Suit via Apple's
23 Accused Products.

24 *Finally*, Wi-LAN objects to the anticipated testimony of Mr. Gunderson on
25 Apple's proffered non-infringing alternatives (NIAs), [REDACTED]
26 [REDACTED]
27 [REDACTED] Mr. Gunderson solely relies on Apple's
28 Technical Experts who in turn relied on speculative lay opinions of Messrs. Sebeni and

1 Kodali; as such, Mr. Gunderson's unsupported testimony on these NIAs should be
2 excluded under Federal Rules of Evidence 701 and 702, and Federal Rule of Civil
3 Procedure 26 and 37 (ECF No. 328-01 at 13-23; ECF No. 384 at 5-10).

4

5 Dated: July 31, 2018

6
7 Respectfully submitted,

8 By: /s/ Allison Goddard

9 Allison H. Goddard (211098)
10 ali@pattersonlawgroup.com
11 PATTERSON LAW GROUP
12 402 West Broadway, 29th Floor
13 San Diego, CA 92101
14 (619) 398-4760
15 (619) 756-6991 (facsimile)

16 Mike McKool
17 mmckool@mckoolsmith.com
18 Ashley Moore
19 amoore@mckoolsmith.com
20 Warren Lipschitz
21 wlipschitz@mckoolsmith.com
22 MCKOOL SMITH, P.C.
23 300 Crescent Court
24 Dallas, TX 75201
25 (214) 978-4000
26 (214) 978-4044 (facsimile)

27 Robert Cote
28 rcote@mckoolsmith.com
Brett Cooper
bcooper@mckoolsmith.com
Jonathan Yim
jyim@mckoolsmith.com
Kevin Schubert
kschubert@mckoolsmith.com
Christopher McNett
cmcnett@mckoolsmith.com
MCKOOL SMITH, P.C.
One Bryant Park, 47th Floor
New York, NY 10036
(212) 402-9400
(212) 402-9444 (facsimile)

Steve Pollinger
spollinger@mckoolsmith.com
Seth Hasenour
shasenour@mckoolsmith.com

1 MCKOOL SMITH, P.C.
2 300 W. 6th Street, Suite 1700
3 Austin, TX 78701
4 (512) 692-8700
5 (512) 692-8744 (facsimile)

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
*Attorneys for Plaintiff,
Wi-LAN Inc.*

PROOF OF SERVICE

I hereby certify that on July 31, 2018, I caused a copy of this pleading to be delivered via CM/ECF on the counsel of record.

Dated: July 31, 2018

By: /s/ Allison Goddard

Allison H. Goddard (211098)
ali@pattersonlawgroup.com
PATTERSON LAW GROUP
402 West Broadway, 29th Floor
San Diego, CA 92101
(619) 398-4760
(619) 756-6991 (facsimile)

Attorneys for Wi-LAN Inc.